

financing which Motorola had extended to a Turkish telecommunications company commonly known as “Telsim,” and by allowing the participants to invest their retirements savings in Motorola stock while the risk of massive losses to Motorola resulting from its dealings with Telsim remained misrepresented or concealed. The district court had original jurisdiction of this ERISA civil action under 28 U.S.C. § 1331.

JURISDICTION OF THE APPELLATE COURT

This Court has jurisdiction because on June 17, 2009, the district court granted Defendants’ motion for summary judgment and entered Judgment in favor of Defendants. This was a final decision of the district court under 28 U.S.C. § 1291 and this Court has appellate jurisdiction under that provision. The date of entry of the Judgment appealed from is June 17, 2009. Notice of Appeal was timely filed on July 14, 2009. There has been no motion filed in the district court for a new trial or alteration of judgment or any other motion claimed to toll the time within which to appeal.

PRIOR AND OTHER APPELLATE PROCEEDINGS

There have been four prior appeals in this case:

1. In No. 05-4141, original Plaintiff Bruce G. Howell appealed the dismissal of his Complaint, which dismissal was based on the ground of release. On March 19, 2007, this Court dismissed that appeal for lack of finality.
2. In No. 06-3413, Plaintiff Howell sought to appeal the district court’s denial of a motion to intervene which had been filed by one John Endsley, a former participant in Motorola’s 401(k) plan. This Court dismissed that appeal for lack of standing on November 20, 2006.
3. After this Court dismissed Howell’s initial appeal for lack of finality, Defendants moved for entry of a final partial judgment pursuant to Fed R. Civ. P. 54(b) against Howell on his individual claims. The district court

granted the motion and Howell subsequently filed a notice of appeal. That appeal is No. 07-3837, which was consolidated for briefing and argument with Appeal No. 08-1696, which appeal is discussed in the next paragraph.

4. Appeal No. 08-1696 is Defendants' appeal from the district court's grant of class certification in this case. This Court granted Defendants' petition brought under Fed. R. Civ. P. 23(f) for interlocutory review of the district court's class certification ruling.

On June 25, 2009, shortly after this Court was advised of the lower court's grant of summary judgment to Defendants, this Court ordered the dismissal of Appeal No. 08-1696 and stayed issuance of a decision in No. 07-3837 pending this appeal.

Pursuant to Circuit Rule 3(c)(1), Appellants, in what they believe to be an excess of caution, advise this Court that Appeal No. 09-1750 involves certain parties in common with this case and a common subject matter (Motorola's dealings with Telsim). Appeal No. 09-1750, however, is not related to this appeal. It appears that in No. 09-1750, the Motorola, Inc. 401(k) Profit Sharing Plan is appealing from an order denying the Plan's claim to a settlement fund created in *In Re: Motorola Securities Litigation*, 03 C 287 (N.D. Ill.), a settled class action brought under the PSLRA relating generally to Motorola's public statements about its dealings with Telsim. Since that appeal appears to turn on the language of the settlement agreement in *In Re: Motorola Securities Litigation*, that appeal raises no issues common to this appeal.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues presented on this appeal are whether, based on the summary judgment record below and under the applicable law, the district court erred in granting Defendants' motion for summary judgment and in denying Plaintiffs' motion for summary judgment.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*. *Buckley Dement, Inc. v. Travelers Plan Administrators*, 39 F.3d 784, 787 (7th Cir. 1994). Similarly, this Court reviews the district court's denial of Plaintiffs' motion for summary judgment *de novo*. *Guzman v. Sheahan*, 495 F.3d 852, 856 (7th Cir. 2007). The district court's legal conclusions are also reviewed *de novo*. *United States v. Whited*, 539 F.3d 693, 697 (7th Cir. 2008). In that connection, Plaintiffs point out that this Court should review *de novo* the district court's legal conclusion that Section 404(c) of ERISA, 29 U.S.C. § 1104(c), provides a complete defense to a claim of imprudent selection of investment options in a 401(k) plan. *See* Document 448 at 22-24. This Court recently declined to decide that issue. *See Hecker v. Deere & Co.*, 556 F.3d 575, 589 (7th Cir. 2009).

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